

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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STATE OF OKLAHOMA, <i>et al.</i>	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., <i>et al.</i>	)	
	)	
Defendants.	)	
	)	

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**DEFENDANTS’ JOINT MOTION IN LIMINE TO EXCLUDE EVIDENCE OF ACTS  
OR INJURIES OCCURRING BEFORE ANY APPLICABLE LIMITATIONS PERIODS  
AND INTEGRATED BRIEF IN SUPPORT**

*In Defendants’ Joint Motion for Partial Summary Judgment as to Plaintiffs’ Time Barred Claims*, Dkt. No. 1876 (Feb. 20, 2009) (“Statute of Limitations Motion”),<sup>1</sup> Defendants set forth the applicable statutes of limitations and enactment dates applicable to Plaintiffs’ claims. Contingent upon this Court’s ruling on this and other pending summary judgment motions, Plaintiffs’ claims at trial may be limited to acts and injuries occurring within those applicable limitation periods.<sup>2</sup> Indeed, Plaintiffs have conceded that certain claims may be limited with

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<sup>1</sup> See also *Reply in Support of Defs.’ Joint Mot. for Partial Summary Judgment as to Pls.’ Time Barred Claims*, Dkt. No. 1930 (Mar. 24, 2009).

<sup>2</sup> With the exception of Plaintiffs’ claims under RCRA (Count 3) and state law public nuisance (Count 4, in part)—which are the subject of separate summary judgment motions, *see* Dkt. Nos. 2033 & 2050—Defendants’ Statute of Limitations Motion sets forth authority to bar or limit Plaintiffs’ remaining claims in accordance with the following limitation periods:

- Count 4 (private nuisance): two-year statute of limitations, *Moneypenney v. Dawson*, 141 P.3d 549, 554 (Okla. 2006); *see* Dkt. No. 1872 at 18-19; Dkt. No. 1930 at 8-9;
- Count 5 (federal common law nuisance): two-year statute of limitations, *see* Dkt. No. 1872 at 10-18; Dkt. No. 1930 at 6-8;

respect to these timeframes. *See, e.g.*, Dkt. No. 1917 at 9 (Mar. 10, 2009). In the event that the applicable statutes of limitations are enforced by the Court, Defendants respectfully move in limine under Federal Rules of Evidence 402 and 403 to exclude evidence of any acts occurring prior to the limitation periods.

### **BACKGROUND**

In light of Plaintiffs’ discovery requests and responses, expert reports and submissions to the Court, Defendants anticipate that Plaintiffs will seek to introduce a significant amount of evidence at trial related to the condition of the Illinois River Watershed (“IRW”), the historical actions of Defendants and non-party farmers and ranchers, and alleged injuries reaching as far back in time as 1960, potentially more than four-decades prior to the applicable limitations period. Plaintiffs have clearly demonstrated their intention to introduce such evidence at trial through the designation of numerous exhibits regarding the alleged historical condition of the IRW and the longstanding practice of using poultry litter as a fertilizer in the IRW. *See Plaintiffs’ Exhibit List*, Dkt. No. 2303-2 (July 1, 2009);<sup>3</sup> *see also, e.g., Plaintiffs’ Motion for Partial Summary Judgment*, Dkt. No. 2062 at ¶¶14, 16, 26, 28, 47, 48(a), 48(c) (May 18, 2009).

Much of the historical evidence Plaintiffs have designated relates to the issue of past damages. Plaintiffs’ purported damages calculations were premised upon alleged phosphorus

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- Count 6 (trespass): two-year statute of limitations, 12 Okla. Stat. § 95(3); *see* Dkt. No. 1872 at 19-20; Dkt. No. 1930 at 9;
  - Counts 7 & 8 (state statutory claims): post-enactment date of each statute, *see* Dkt. No. 1872 at 22-23; Dkt. No. 1930 at 10.

<sup>3</sup> *See, e.g., id.* at Exs. 492-493 (“Pre-1930” photos), 499-500 (photos of Lake Francis and Illinois River “about 1928”), 2429-2450 (“United States Census of Agriculture – AR” reports from 1950 to 2002), 2488-2489 (“Poultry production within the [IRW] 1949/1950 – 2002”), 3092 (“Historical References To Illinois River Quality”), 3119-3122 (“Chronicles of Oklahoma” dated 1927, 1940 and 1985), 4140-4143 (Arkansas Censuses of 1940, 1945, 1954 and 1959), 4220-4261 (“Census of Agriculture” for Oklahoma and Arkansas for 1925 to 2002), 4980-4989 (“Potential for Manure Phosphorus to Exceed Plant Uptake and Removal” for 1949 to 1992), 5790-5808 (“Oklahoma Agricultural Statistics” from 1976 to 1993).

loading occurring throughout the past half-century, and relied in part on photos and descriptions of the IRW's conditions throughout that time period. However, those damage calculations are no longer at issue in this case. *See* Dkt. No. 2362. Because the remaining claims focus on injunctive relief against current activities, this historical evidence is of no continuing relevance.

On the basis of the arguments and authorities set forth herein, the Court should exclude the proffered evidence under Rules 402 and 403 because such evidence is not relevant and unfairly prejudicial, confusing and unnecessarily cumulative.

### **ARGUMENT**

#### **I. EVIDENCE OF ACTS OR INJURIES PRECEDING ANY APPLICABLE LIMITATIONS PERIODS SHOULD BE EXCLUDED**

While “there is no rule that automatically excludes evidence pre-dating a statute of limitations period” as not relevant under the Federal Rules of Evidence,<sup>4</sup> an analysis of Plaintiffs’ proposed evidence pre-dating the limitations periods is required under Federal Rule of Evidence 402, which mandates that “[e]vidence which is not relevant is not admissible.” Fed. R. Evid. 402. Federal Rule of Evidence 401 defines “relevant evidence” as:

[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401. Pursuant to a separate analysis, Federal Rule of Evidence 403 provides that:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. The question of relevancy and the task of balancing the probative value of evidence against the dangers of unfair prejudice, confusion, undue delay and other considerations

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<sup>4</sup> *EPA v. Green Forest*, 921 F.2d 1394, 1409 (8th Cir. 1990); *see Hughes v. Reed*, 46 F.2d 435, 442 (10th Cir. 1931).

are both matters for the discretion of the trial court. *See Averitt v. Southland Motor Inn*, 720 F.2d 1178, 1181 (10th Cir. 1983); *Rigby v. Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir. 1977). In the present matter, the Court should exercise its discretion to exclude any proffered evidence pre-dating the applicable limitations periods.

**A. Evidence Of Acts Or Injuries Occurring In The IRW Prior To The Applicable Limitations Periods Is Not Relevant Evidence Under Rule 402**

Plaintiffs remaining claims seek an injunction to stop the current practice of spreading poultry litter as a fertilizer and soil amendment pursuant to state-issued plans. Because only injunctive relief is at issue in this case, the vast majority of the evidence that Plaintiffs seek to present for purposes of establishing alleged past damages is not relevant. *See* Fed. R. Evid. 401; *see, e.g., Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron*, 805 F.2d 907, 916 (10th Cir. 1986) (excluding evaluation of pilot five months prior to accident because it “was remote enough in time to lack relevance”). Accordingly, any evidence that pre-dates the applicable limitations periods should be excluded under Rule 402. *See* Fed. R. Evid. 402 (“Evidence which is not relevant is not admissible.”).

**B. The Probative Value Of The Proffered Historical Evidence Is Substantially Outweighed By Considerations Of Potential Prejudice And Undue Delay**

As detailed *supra*, Plaintiffs’ proposed evidence of actions and alleged injuries occurring before the relevant limitations periods presents minimal, if any, probative value. Conversely, significant dangers will be realized through the admission of such historical evidence.

First, Defendants would be unfairly and irreparably prejudiced by Plaintiffs’ reference to any alleged improper historical conduct or purported injuries, none of which constitutes a basis for present equitable relief. *See, e.g., Rocky Mountain Helicopters*, 805 F.2d at 916 (excluding evaluation of pilot five months prior to accident because it “was remote enough in time to lack relevance and raise concerns about the potential prejudicial effect such evidence might have”).

Second, the introduction of such historical evidence risks confusion as to the actual conduct or alleged injuries at issue, particularly in light of the changing circumstances over time. Moreover, if such evidence is admitted the proceedings will likely devolve into a mini-trial regarding the legality of Defendants' prior conduct and/or the existence of any alleged injuries pre-dating the relevant limitations period. Those alleged injuries are no longer at issue, and thus this evidence confuses the issues actually in dispute, uselessly delays the trial, and is to be avoided in accordance with Rule 403. *See, e.g., Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir. 1997) (affirming exclusion of evidence of "limited" probative value that "could have lead to a side trial that would distract the jury from the main issues in the case"); *United States v. Talamante*, 981 F.2d 1153, 1156 & n.5 (10th Cir. 1992) (supporting exclusion of evidence that would "lead to collateral mini trials").

Finally, Plaintiffs' reliance on evidence pre-dating the relevant limitations periods is cumulative and would needlessly consume valuable judicial and party resources. *See* Fed. R. Evid. 403. "Evidence is 'cumulative' when it adds very little to the probative force of the other evidence in the case, so that if it were admitted its contribution to the determination of truth would be outweighed by its contribution to the length of trial, with all potential for confusion, as well as prejudice to other litigants...." *United States v. Williams*, 81 F.3d 1434, 1443 (7th Cir. 1996). Evidence from before the applicable limitations period offered to show past conduct or injuries in the IRW clearly meets this definition. Moreover, Plaintiffs have no need to rely upon such historical evidence, as the same forms of evidence are available for use at trial from the relevant limitations period. *See, e.g., Tioga Public School Dist. #15 v. United States Gypsum Co.*, 984 F.2d 915, 923 (8th Cir. 1993) (excluding evidence of prior conduct under FRE 403 where party had already introduced "considerable evidence" regarding the same topic "during the period ... at issue in this case").

In the present circumstances, the limited probative value of the historical evidence proffered by Plaintiffs is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, ... undue delay ... [and] needless presentation of cumulative evidence.” Fed. R. Evid. 403. As a result, any evidence pre-dating the applicable limitations periods should be excluded under Rule 403.

### **CONCLUSION**

For the foregoing reasons, the Court should grant Defendants’ motion in limine to exclude evidence of acts or injuries occurring before any applicable limitations periods.

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